

Committee on Resources

Subcommittee on Fisheries Conservation, Wildlife and Oceans

Statement

TESTIMONY OF
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NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE
ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT
BEFORE THE
SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE & OCEANS
COMMITTEE ON RESOURCES
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Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify before the Subcommittee today on the Regulatory Flexibility Act (RFA) and the economic impacts of my agency's regulations on small entities. I am Penelope Dalton, Assistant Administrator for Fisheries.

The National Oceanic and Atmospheric Administration (NOAA) is deeply and unequivocally committed to the sustainable stewardship of marine resources and the economic health of the fishing industry and dependent communities. We at NOAA Fisheries realize that agency actions implemented under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Marine Mammal Protection Act, and other statutes we administer have far-reaching effects on commercial and recreational fisheries and on the environment. We take seriously our mandate under the RFA to consider economic impacts of conservation and management measures on small entities, and we seek to minimize them whenever possible. Since passage of the RFA in 1980, NOAA Fisheries has integrated the analytical requirements of the Act into its decisionmaking process. We are continually reviewing and revising our policies and guidance to ensure that the best possible economic analysis of agency actions is incorporated into the decisionmaking process, and we use the best scientific data available. However, the collection of economic data often is impeded by statutory and financial constraints, and -- in some cases -- by industry reticence. The testimony describes both our successes and our challenges.

Working Closely with the Small Business Administration (SBA) and the Councils

We have some important partners in our implementation of the RFA. Our progress to date has relied on a close working relationship with the Small Business Administration. NOAA Fisheries has worked with the SBA since 1980 to prepare agency guidelines for the preparation of regulatory flexibility analyses. Our current guidelines describe a "small entity" based on Part 121 of Title 13, Code of Federal Regulations, and provide general criteria for determining "significant economic impact" and "substantial number of small entities." They also emphasize the need for a full description of each alternative considered, including the "no action" alternative. We have worked with the SBA to resolve issues regarding the nature and level of economic impacts on small entities.

NOAA Fisheries has also worked with the Regional Fishery Management Councils (Councils) to ensure that they explore a full range of proposed alternative measures during the development of fishery management plans (FMPs), FMP amendments, framework adjustments, and annual specifications. In reviewing proposed alternatives, NOAA Fisheries seeks to ensure that the selected alternatives minimize the economic impacts on small entities while meeting the goals and objectives of the FMPs. In addition, the alternatives are presented at public hearings so that small businesses and others affected by the measures have an opportunity to comment. The Councils consider those comments before making recommendations to NOAA Fisheries for approval and implementation. In cases where the analysis is inadequate or management measures do not minimize impacts to the extent possible while still achieving management objectives, NOAA Fisheries works closely with the Councils to supplement analyses or consider additional alternatives.

Utilizing an Important Tool for Decisionmaking

As mentioned earlier, these analyses are an important decisionmaking tool, and complement work done for Regulatory Impact Reviews (RIRs), Fishery Impact Statements, and for determining impacts on fishing communities in compliance with National Standard 8 of the Magnuson-Stevens Act.

RFA considerations play a major role in the selection of management actions, and therefore significantly affect fisheries conservation and management. Based on information obtained through RFA analyses, fisheries managers may or may not select a particular management action such as seasonal closures or gear restrictions, or may choose to institute changes over several years, rather than all at once. For instance, the New England Council and NOAA Fisheries decided to phase in the days-at-sea program over two years instead of one in the Northeast multispecies fishery, because we feared the vessels could not weather such a sudden decrease in effort. As a result of the RFA and other analyses, economic, social, and biological considerations are integrated to assist fisheries managers in making the best possible decisions for the resource, as well as for the well-being of the Nation, the fishing industry, and dependent communities.

The RFA process begins with a preliminary (threshold) analysis to determine whether the economic impacts of proposed alternatives meet NOAA Fisheries criteria for "significant economic impact on a substantial number of small entities." If the results indicate "no significant economic impact," the Commerce Department makes a certification, with the factual basis for the finding, to that effect to the SBA. We publish that certification in the proposed rule for public comment. When such a certification is not made [cannot be made] because there may be significant economic impacts on a substantial number of small entities, an Initial Regulatory Flexibility Analysis (IRFA) is prepared. The IRFA includes analyses of alternatives considered and discussions of why the preferred action was chosen over the rejected alternatives. A summary of the impacts of the alternatives is included in the preamble to the proposed rule. A Final Regulatory Flexibility Analysis (FRFA) is prepared and a summary published with the final rule.

The FRFA includes any changes made to the IRFA as a result of comments received, responses to the comments, as well as analysis of alternatives considered, and a description of steps the agency has taken to minimize any significant economic impacts of the rule. In 1998, a total of 269 rules were published by NOAA Fisheries in the Federal Register. Of those, 21 (8 percent) were determined to be significant after preliminary analyses were done.

Meeting Legal Challenges

In 1996, the Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA by making agency compliance with the statute judicially reviewable. As of June 27, 1996, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of an agency's compliance with the requirements of the RFA. Since that date, RFA violations have been alleged in nine cases or groups of cases challenging NOAA Fisheries regulatory actions. These cases are listed and summarized in an attachment to my testimony.

Of the nine, no substantive rulings have been issued in three cases, and plaintiffs dropped the entire case or the RFA allegations in two others. In the earliest case, Associated Fisheries of Maine v. Daley, the First Circuit Court of Appeals held that NOAA Fisheries had fulfilled its statutory obligations by considering numerous alternatives, adopting some measures designed to ease the regulatory burden, and satisfactorily explaining the reasons for rejecting others. The next case was Midwater Trawlers Cooperative v. Department of Commerce. The Ninth Circuit Court of Appeals found reasonable NOAA Fisheries' consideration of the vessels' total reduced revenue, rather than just reduced revenue from the whiting fishery. The Court said the RFA "calls for the agency to consider the effect on the entity, not the effect on revenue earned from a particular harvest."

In three related cases entitled North Carolina Fisheries Association v. Daley, the District Court for the Eastern District of Virginia found that NOAA Fisheries' failure to prepare regulatory flexibility analyses on the 1997 summer flounder quota violated the RFA. NOAA was ordered to undertake an analysis of the economic impacts on small entities in North Carolina, and to set annual quotas and make adjustments to them "within a reasonable period of time." In subsequent proceedings, NOAA Fisheries' economic analysis was found deficient for failure to give meaningful consideration to the economic impact of the 1997 quota on North Carolina fishing communities. Also finding that the agency had violated his earlier order to make timely adjustments to the 1998 quota, the judge sanctioned the agency by setting aside deductions to the North Carolina quota for overages in previous years. Although the ruling is subject to interpretation, the sanction appears to be based on equitable powers to remedy violation of that order, rather than on any remedial authority found in the RFA.

One case that is still pending is Southern Offshore Fishing Association v. Daley, a challenge to the 50 percent reduction in the 1997 commercial quota for Atlantic large coastal sharks. The District Court for the Middle District of Florida upheld the quota reduction, but rejected NOAA Fisheries' final regulatory flexibility analysis concluding that average reductions in revenues would not correspond to the 50 percent quota reduction because most shark fishermen operate in other fisheries as well. The judge remanded the RFA determinations for additional economic analysis. NOAA Fisheries then conducted a more thorough analysis concluding that the quota reduction may have had a significant economic impact on a substantial number of small entities, but that there were no available alternatives to reduce those impacts without jeopardizing the long-term viability of the fishery. The judge questioned our characterization of the universe of small entities and criticized the NOAA Fisheries report for failure to develop workable alternatives to the quota reductions. The case is now before a mediator.

One could say this litigation under the RFA has been a "learning experience" for the agency. Our efforts to comply with the Regulatory Flexibility Act, though well intentioned, have not always met with judicial favor. We recognize that there is room for improvement in our economic analyses, and I would like to describe the steps we are taking to make them better.

Obtaining the Best Possible Economic Data and Improving Our Analyses

We have ongoing data collection programs (e.g., logbooks, dealer reporting) that provide data on ex-vessel prices and landings for various categories of vessels, gear types, and fishing modes for each fishery. Ad hoc economic surveys also provide useful data for doing these analyses. Since the enactment of the RFA, improvements for some fisheries have been made in both the breadth and quality of data collected for qualitative and quantitative analyses. For example, the Marine Recreational Fishery Statistical Survey (MRFSS) recently started collecting economic data that include the charter boat sector. A limited number of new efforts are underway that will provide more and better economic data in the future. However, some gaps remain, such as costs and earnings data for fishing firms (harvesting sector), recreational charters and party boats, and processing firms. In January of this year NOAA Fisheries delivered a Report to Congress entitled "Proposed Implementation of a Fishing Vessel Registration and Fisheries Information System" that incorporated these economic data needs as an integrated and collaborative state-federal partnership for improving the information and analysis needed for living marine resource stewardship.

NOAA Fisheries has also invested in new agency-wide analytical tools such as IMPLAN, an Input/Output (I/O) economic model and database, to assess the impacts of regulations on fishing communities and their effects on the sustainability of those communities as required under National Standard 8. Further, we are exploring the possibility of better integration of information provided by the Department's Bureau of Economic Analysis and Census Bureau, as well as data collected by coastal states and submitted to NOAA through their Coastal Zone Management plans.

As I mentioned earlier, one constraint on our efforts to improve data collection and analysis is financial. Resources are insufficient to reduce the uncertainty and risk associated with evaluating certain management alternatives. Thus, we are vulnerable to overlooking or accepting alternatives with unanticipated effects, due to the limitations of our economic models and underlying data. NOAA Fisheries has a strategy to address this vulnerability and has already redirected resources for the hiring of economists in our headquarters and regional offices to add to the approximately six economists who are currently involved in preparing and reviewing RFA analyses. We are grateful to Congress for providing additional Sustainable Fisheries Act funding that will help make this possible. However, the significance of the economic information and analysis gaps are such that the President has requested \$1 million in his FY 2000 budget to improve further the agency's ability to collect necessary economic data and analyze it properly.

Another constraint is statutory. Section 303 (b) (7) of the Magnuson-Stevens Act *"requires fish processors who first receive fish that are subject to the plan to submit data (**other than economic data**) which are necessary for the conservation and management of the fishery."* This provision restricts the mandatory collection of cost and earnings data for the seafood processing sector, yet such data are vital not only for determining economic impacts on small entities, but also for determining net economic benefits to the Nation. Eliminating this constraint would significantly enhance the ability to collect economic data from the seafood processing sector, because these data are seldom voluntarily provided. This change could be handled in an amendment to the Magnuson-Stevens Act.

Just as important as the collection of timely and complete data is sophisticated modeling to analyze the complex interactions between management measures and economic effects. State-of-the-art modeling techniques that incorporate information from the biological and social sciences would improve NOAA Fisheries' ability to make accurate predictions about economic impacts and benefits. As we improve our capabilities to conduct integrated analyses, scientific assessments of both fish stocks and participants in the fisheries will be enhanced. This information will enable managers to foresee the impacts of proposed regulations and to choose the alternative that best conserves stocks while increasing benefits to the Nation.

NOAA Fisheries is making a considerable effort to provide additional training for its employees and to issue clear guidance. As part of our efforts to improve the quality of our RFA analyses, the agency held a workshop in Long Beach, California, in September, 1998. The workshop was held in response to questions from the public and information from SBA on alternative approaches to analyses. Participants at the workshop came up with recommendations and suggestions for improving our current guidelines, which were given to an agency working group to develop into draft revisions. The revised guidelines will be completed in late 1999, and we will undertake an extensive effort to educate employees in using these guidelines. In addition, NOAA Fisheries is reviewing SBA's draft RFA Practitioners' Manual and will provide comments to SBA in producing a practical manual that can be used by federal agencies for the successful implementation of the RFA.

Thank you, Mr. Chairman, for this opportunity to review the progress we've made at NOAA Fisheries in meeting the requirements of this important law. We are committed to upholding the laws that protect our citizens, including our fishermen, in their efforts to make a decent living, as well as the laws that conserve our Nation's marine fisheries resources. Mr. Chairman, this concludes my testimony. I am prepared to respond to any questions members of the Subcommittee may have.

Attachment

Review of Recent NOAA Litigation Related to the Regulatory Flexibility Act

The following are recent court cases related to the RFA. Each listing provides a summary of the legal action, the main issues involved in the litigation, and the outcome, if a decision has been issued. It should be noted that, since implementation of the RFA, NMFS has implemented rule making under 39 Fishery Management Plans, but has been sued for relatively few actions related to the RFA. NMFS has won most of these law suits; in no case has a violation of the RFA been the basis for modification of NMFS regulatory action.

Associated Fisheries of Maine v. Daley, 954 F.Supp. 383 (D. Maine 1997); 127 F.3d 104 (1st Cir. 1997).

This case, filed March 31, 1994, challenged Amendment 7 to the Northeast Multispecies Fishery Management Plan. Judge Hornby held that the Small Business Regulatory Enforcement Fairness Act (SBREFA) did not apply retroactively to a final regulatory flexibility analysis (FRFA) prepared before SBREFA was enacted. The appellate court elected to rule on the merits, rather than on the retroactivity question, and held that the agency had fulfilled its statutory obligations by considering numerous alternatives, adopting some measures designed to ease the regulatory burden, and satisfactorily explaining the reasons for rejecting others. It also held that the FRFA could consist of the initial analysis plus the agency's responses to public comments.

Midwater Trawlers Cooperative, West Coast Seafood Processors, and Fisherman's Marketing Ass'n v.

Department of Commerce, No. C96-1808R (W.D. Wash., May 1, 1997); 1999 U.S. App. LEXIS 5953 (9th Cir., April 2, 1999).

NMFS published a final rule allocating 7 percent of the whiting harvest guideline to an Indian tribe to accommodate its treaty fishing right. This rule was published after the enactment, but before the effective date, of SBREFA. The rule indicated that a substantial number of small entities would be impacted but the impacts would not be significant. The agency concluded that in 1994 the whiting harvest accounted for only 35 percent of the ex-vessel value of vessels landing whiting onshore, and only 20 percent in 1995. Therefore a 7 percent reduction in the whiting allocation would result in approximately 1 to 3 percent reduction in average gross annual income.

The suit was filed November 14, 1996. On a motion for summary judgment, Judge Rothstein questioned whether it should review compliance with the RFA in light of the fact that SBREFA did not take effect until after the final rule was published, but concluded that it could resolve the issue on the merits and therefore did not have to address the threshold question or reviewability. The court held that the agency's approach was "reasonable" and that it did not have to consider the impacts to the whiting sector in isolation from the other aspects of the fishery. The Ninth Circuit Court of Appeals upheld the ruling, saying the RFA "calls for the agency to consider the effect on the entity, not the effect on revenue earned from a particular harvest."

North Carolina Fisheries Ass'n and Georges Seafood, Inc. v. Daley, 1997 U.S. Dist. LEXIS 19470 (E.D. Va. 1997); 27 F.Supp.2d 650 (E.D. Va. 1998).

This action, originally filed on April 7, 1997, challenged NMFS' setting of the 1997 summer flounder quota for the state of North Carolina and the subsequent downward adjustment to account for the previous year's overages. Among other things, plaintiffs alleged that NMFS violated the RFA and the APA in failing to prepare an IRFA and FRFA.

At the proposed rule stage, NMFS certified that the action would not have a significant economic impact on a substantial number of small entities because "[t]he recommended 1997 quota is no different from the 1996 coast wide harvest limit....These measures may impact the fishing industry negatively for the short term, but will prove beneficial in the future." NMFS received several comments on the certification and responded to them in the final rule. None of the comments caused NMFS to change its certification; therefore, no RFA analysis was prepared.

Judge Doumar held there was no factual basis for determining lack of impact. There must be a showing that the quotas have been examined in light of the current year's conditions. The court ordered the NMFS to undertake an analysis of the economic impacts on small entities in North Carolina (as opposed to the fishery as a whole). The judge also ordered NMFS to set annual quotas and make adjustments to them "within a reasonable period of time."

NMFS then prepared and submitted an economic analysis that examined the impacts of the final 1997 quota and its subsequent adjustments. Judge Doumar appointed an expert to review the analysis on behalf of the court. The economic analysis concluded that under the adjusted 1997 quota 19 percent of all fishery participants would experience revenue reductions of 5 percent or more. In assessing the impact of the unadjusted 1997 quota on North Carolina, the analysis found it possible that the first criterion of significance employed by NMFS (that is, 20 percent of the affected entities suffering a loss of revenue of 5 percent or more) would be triggered if the quota were compared with the actual landings in 1996. The analysis was confounded because it is hard to predict what alternative fishing activities vessel operators would pursue to

mitigate any potential losses. With respect to both the initial and subsequent adjustment to the North Carolina quota, the analysis unequivocally concluded that there would be significant impacts; 57 percent of the vessels would suffer a 5 or more percent reduction in revenue from the first adjustment and, from the second adjustment, 3.6 percent of the vessels would suffer revenue losses of 50 percent or more. In both instances, the analysis pointed out that these losses would be "moderated" by revenues derived from overages during the previous years. This statement did not contradict the conclusion that the impact of these adjustments was significant.

In subsequent proceedings, plaintiffs lodged various criticisms of the revised economic analysis and challenged an overage deductions from the 1998 summer flounder quota as untimely. The court found NMFS had been arbitrary and capricious in failing to give meaningful consideration to the economic impact of the 1997 quota regulations on North Carolina fishing communities. Plaintiffs asked the court to hold the Secretary of Commerce in contempt of court for the untimely quota adjustment. The court fashioned a "sanction" -- probably stemming from his equitable powers to remedy violation of his earlier order rather than from any remedial authority found in the RFA -- by setting aside the overage deductions. In other words, North Carolina fishermen took almost 400,000 pounds of summer flounder in 1997 that never have to be "repaid."

Southern Offshore Fishing Ass'n, Directed Shark Fishery Ass'n, Seafood Atlantic, Inc., Fishermen's Ice and Bait, Inc., Harrison Int'l Enterprises, Inc., Willie R. Etheridge Seafood Co., Inc., Tristram Colket, Harold West, Bruce Stiller, and Glen Hopkins v. Daley, 1998 U.S. Dist. LEXIS 3478 (M.D. Fla. 1998).

NMFS issued a proposed rule to reduce the 1997 commercial harvest quota for the Atlantic large coastal shark fishery by 50 percent. NMFS published a certification in the proposed rule that the action would not have a significant economic impact on a substantial number of small entities because "of the large degree of diversification in fishing operations that exist, and the already short shark fishing season as outlined in the [Regulatory Impact Review]."

NMFS received comments from several shark fishermen and the Small Business Administration indicating that the proposed rule might have a significant economic impact on a substantial number of small entities. In response to the comments, NMFS prepared an FRFA for the final rule. In summary, the FRFA shows that 97.7 percent of the permitted shark fishermen hold other fishing permits, that a directed shark fisherman would earn an estimated \$26,426 in gross revenue from the large coastal shark fishery alone, and that this income would be supplemented by income from fishing for other Atlantic sharks and other species such as tunas and swordfish. NMFS also indicated that nearly all Atlantic shark fishermen operate in the multispecies longline fishery where gear requirements are substantially similar and require only a modification to fish at different depths. The agency concluded that a 50 percent reduction in the 1997 shark quota is highly unlikely to result in a corresponding reduction in gross exvessel revenues of shark fishermen.

May 2, 1997, the plaintiffs, a coalition of shark fishermen and shark organizations, challenged the rule on the grounds that it was unsupported by record and did not comply with the RFA. The court did not accept the agency's presentation of the data. Judge Merryday appeared to give greater significance to plaintiffs' information on entity-specific impacts than to the agency's description of average impacts. The court found that NMFS "inconsistently characterized the universe of small entities." For example, NMFS used the number of entities with shark permits to represent the universe of affected entities, but in another document NMFS stated that the "American shark fishery" consists of the 326 vessels that actually harvested the resource. The court held that the FRFA did not explain the basis for \$26, 426, nor why that would not

constitute a significant economic impact on a substantial number of small entities pursuant to NMFS guidelines. The court remanded the RFA determinations for more economic analysis, and maintained jurisdiction over the case.

In response to the court's order, NMFS submitted a report titled "Final Consideration of the Economic Effects and Potential Alternatives to the 1997 Quotas on the Atlantic Large Coastal Shark Fishery" to the court. This report contained an extended analysis of the economic impact on fishing firms and processors of the 1997 large coastal sharks (LCS) quota cuts. Logbook data for 1995 and 1996 were used for the analyses. Four scenarios ranging from the quota reduction affecting all participants equally to the quota reduction affecting only highliners are used to depict the likely range of impacts.

The report concludes that the analyses are generally in agreement with those in the FRFA for the final rule. However, the report states that: "In order to be conservative with regard to the potential effect on shark operations, NMFS concludes that the 1997 quota cuts may have had a significant economic impact on a substantial number of small entities....However, the analyses concludes that there were no available alternatives that could reduce those economic impacts without possibly jeopardizing the long term viability of the LCS stocks, and thus the fishery."

The court ruled on October 16, 1998, not to overturn the NMFS quota restrictions, but appointed a Special Master to analyze the bona fides of the NMFS submission to the court of available workable alternatives to the drastic quota reductions. That order was stayed; the case is now before a mediator.

Atlantic Fish Spotters Ass'n, Jonathan E. Mayhew, Raynold F. Brooks II, and Robert Sampson v. Daley, No. 97-11882JLT (D. Mass.)

Filed on August 18, 1997, this suit challenged a rule prohibiting certain Atlantic bluefin tuna fisherman from harvesting fish with the use of spotter aircraft. Count Two, alleging a violation of the RFA, was dropped by plaintiffs during the litigation.

Kline v. Daley, Civ. No. 97-2758 (N.D. Cal.).

This case, filed September 22, 1997, challenged agency management of the fixed-gear black cod fishery. The complaint alleged RFA violations, but plaintiffs eventually filed a stipulation to dismiss the lawsuit.

Texas Shrimp Ass'n and Wilma Anderson v. Daley, Civ. No. B-98-65 (S.D. Tex.), transferred and consolidated with Florida Wildlife Federation v. Daley, Civ. No. 4:98:CV101-RH (N.D. Fla.)

The TSA case was filed in Texas on May 8, 1998, but will be heard by Judge Hinkle in the Northern District of Florida in conjunction with the Florida Wildlife Federation case, filed March 18, 1998. The TSA challenge is to regulations implementing Amendment 9 to the Gulf of Mexico Shrimp FMP and subsequent rules affecting the shrimp and red snapper fisheries. Count 10 of the complaint alleges that the analyses prepared by the Gulf Council and by NMFS were "erroneous and misleading as to the enormity of the actual impact and the estimated benefits" of these actions.

Jeffrey Tutein, Dorwin Allen, Raymond Kane, Ronald Marsh, and Eric Hesse v. Daley, 1999 U.S. Dist. LEXIS 4002 (D. Mass. 1999)

This case, filed May 29, 1998, challenged NMFS' identification of Atlantic bluefin tuna as "overfished" and

provisions of the revised national standard guidelines. The complaint also alleged an RFA violation in that no regulatory flexibility analysis was prepared in connection with the guidelines. On March 17, 1999, Judge Bowler dismissed count I challenging the guidelines on the basis that the issue was not ripe for judicial review. An order on April 12, 1999, dismissed count II, also on ripeness grounds, but did not dismiss the RFA count.

Gulf of Maine Fishermen's Alliance, Inc. v. Daley, Civ. No. 98CV10744GAO (D. Mass)

Filed on June 19, 1998, this case challenged Framework 25 of the Northeast Multispecies Fishery Management Plan under the Magnuson-Stevens Act, the RFA, NEPA, and the APA.

Framework 25 is the annual adjustment required to address continued overfishing on groundfish stocks, specifically Gulf of Maine cod. Plaintiffs, mostly small inshore gillnetters from Massachusetts, complain that no RFA analysis was done in connection with the rule. Oral argument was held February 11, 1999.

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